CRIMINAL APPEAL No.112 OF 1988

AGAINST THE JUDGMENT AND ORDER DATED 17.2.1988 PASSED BY 1ST ADDITIONAL SESSIONS JUDGE, GAYA IN SESSIONS TRIAL NO.369 OF 1982/ 58 OF 1985.

BANARAS SINGH & BANARASI SINGH …… APPELLANT

Versus

STATE OF BIHAR; RESPONDENT.

FOR THE APPELANT: M/S KANHAIYA SINGH, SENIOR ADVOCATE
AND MR. ASHUTOSH KUMAR, ADVOCATE.

FOR THE RESPONDENT: A.P.P.

P R E S E N T

THE HON'BLE MR. JUSTICE GHANSHYAM PRASAD
THE HON'BLE MR. JUSTICE SHYAM KISHORE SHARMA

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Ghanshyam Prasad,J. This appeal has been preferred against the judgment of conviction and order of sentence dated 17.2.1988 passed by the Additional Sessions Judge, 1st, Gaya in Sessions Trial No. 369 of 1982/ 58 of 1985.The sole appellant has been convicted under Section302 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for life.

2. The prosecution story as unfolded in Fardbeyan in short are that there was one New Anand Hotel in Gaya Town situated on the station road near Gaya station. P.W.1, Prabhu Chand Gupta, was its proprietor. The proprietor used to sit on the counter of the hotel in night shift. On23.8.1980 at 10 P.M. two customers including this appellant, Banaras Singh and his cousin, the deceased, Jitendra Kumar Singh, came in the hotel and asked for a room for night stay. The

proprietor (P.W.1) booked and allotted room no.7 on second floor and handed over the key to the appellant. Banaras Singh. The appellant himself filled up the register of the hotel.

3. Further story is that at about 3.00 A.M. the servant/ waiter of the hotel (P.W.3), Harish Chand Nayak who was sleeping on second floor near the room no.7 came down and informed the proprietor about the sound of screaming coming out of room no. 7. In the meantime, the appellant was seen coming out of the room along with Jhola. On suspicion P.W.1 stopped him and asked as to why he was going alone out of the hotel in odd hours. He also inquired about his room-mate. Not being satisfied with the answer, the proprietor of the hotel along with the appellant and waiter went up-stair The room no.7 was found locked from outside. On being asked by the proprietor the appellant opened the room. There was dark in the room. P.W.1 asked the appellant to switch on the light. The appellant hesitated upon which P.W.1 himself switched on the light and saw the deceased lying on bed in pool of blood. The appellant on inquiry confessed about the commission of murder with dagger. P.W.1 returned to ground floor and informed the police. Immediately the police along with patrolling party came in the hotel and took charge of the appellant .The weapon of murder, i.e., blood stained dagger (material Ext. IX) was recovered from the ventilator of the room at the instance of he appellant. The police, P.W.6, Murtuza Hassan seized the dagger in presence of the witnesses (Ext. 1/1). The police also seized Jhola containing blood stained cloths through seizure list (Ext.1).

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4. P.W.6 recorded Fardbeyan (Ext. 2) of P.W.1 .He prepared the inquest report and sent the dead body for post mortem examination. Later on the seized cloths etc. were sent to the Forensic Science Laboratory for chemical examination. Ext. 8 is the report of chemical examiner.Dr. Suresh Prasad (Since dead) of M.M.C.H. Gaya conducted post mortem and found as many as twenty two injuries on several parts of the body. P.W.5, Dr. Vijay Kumar proved post mortem as Ext.4.

5. P.W.6 registered the case and took up investigation himself. Ultimately the charge-sheet was submitted against the appellant under Section 302 of the Indian Penal Code.

6. In course of the trial the prosecution examined altogether seven witnesses including the informant as P.W.1, the Investigating Officers, Murtuza Hassan as P.W.6, Ram Sewak Singh as P.W.7, the waiter of the hotel, Harish Chand Nayak as P.W.3 and father of the deceased , Ram Awadh Singh as P.W.4.

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7. The defence as usual is denial of the occurrence and plea of innocence. Further defence is that actually the hotel staff robbed and committed murder of the victim and when the accused-appellant went to meet the victim they falsely implicated him in order to save their own skin. However, no witness has been examined nor any document has been brought on record to support the defence story.

8. Manifold argument were canvassed on behalf of the appellant to assail the findings of guilt recorded by the trial court. It was urged that apart from the paucity of direct evidence suggesting

the appellant to be murderer of the deceased, circumstantial evidence was also not of conclusive nature which would conclusively lead to the guilt of the appellant. Motive for murder was also not brought on the record and the trial court without evaluating the evidence in proper perspective jumped on erroneous conclusion recording guilt of the appellant. Last argument of the learned counsel for the appellant was that the Fardbeyan was anti dated and it was drawn after due deliberations and manipulation in order to falsely implicate the appellant.

9. Certain facts of the case are not in dispute. It is not in dispute that the dead body of the victim, Jitendra Kumar Singh, was found lying in pool of blood in room number 7 of New Anand Hotel in wee hours of the alleged date of the occurrence. It is also not in dispute that the dead body of the victim bore multiple stab injuries and he died of those injuries. It is not in dispute that the appellant was arrested in the hotel in early morning on the alleged date of the occurrence. The victim and the appellant were cousin and belonged to one and the same family.

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10. The post mortem of dead body of the victim was held on 25.8.1980 at 12.30 P.M. by Dr. sureh Prasad of M.M.C.H. Gaya. The doctor himself died in the year 1982 and therefore he could not be examined in trial. The post mortem report (Ext.4) has been proved by P.W.5, Dr. Vijay Kumar, Associate Professor of Forensic Science Laboratory. The post mortem report would go to show that the victim had as many as twenty three anti mortem injuries on various parts of

the body. Out of them twenty two injuries were caused by sharp cutting penetrating weapon and the death was also caused as a result of those injuries..

11. P.W.1, Prabhu Chand Gupta, the maker of the Fardbeyan, was also the owner of the hotel in question .The hotel had some rooms for stay at upper storey of the building. The counter of the hotel was situated on ground floor. This witness used to sit on the counter in the night. He has stated in his evidence that on 23.8.1980 at about 10 P.M. two persons came in the hotel and one of them, named Banarasi Singh filled up the register of the hotel. Both were allotted room number 7 situated on second floor and the key was handed over to them. This witness would further state that at about 3.00 A.M. in the early morning while he was sitting on the counter the waiter of the hotel, P.W.3, who was sleeping on second floor, came down and informed him that the cry of “hai Mai, hai Bap” was coming out of room number 7. In the meantime, the appellant also came down along with Jhola hanging on his shoulder and tried to silently go out of the hotel. This witness stopped him and asked about his colleague. This witness would further state that on suspicion he went up- stair along with the appellant and waiter and found the room locked from outside. The room was opened by the appellant and thereafter in the electric light he saw the dead body of his colleague lying on the bed in pool of blood bearing several injuries. He would further state that on inquiry the appellant confessed before him that he had committed murder of his colleague. He kept the accused under the watch of the waiter and

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himself came in ground floor to inform the police. In the meantime, the patrolling party of Kotwali police station came to whom he informed about the occurrence. The A.S.I. P.W.6, Murtuza Hassan went up stair along with this witness and took charge of the appellant. Before him also the appellant confessed his guilt and upon his statement the weapon of the offence, blood stained dagger was seized by the police from the ventilator of the room. Further evidence of this witness would go to show that the police searched the Jhola of the appellant and seized the blood stained cloths etc. The seizure lists were prepared in presence of the witnesses over which he appended his signature. The police also seized blood stained Tosak, pillow, bed-sheet etc. This witness gave his Fardbeyan before the police in room number 7 which is Ext 2.

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13. The other main witness is P.W.3, Harish Chand Nayak. At the relevant period he was an employee in the hotel in question. His evidence would go to show that in the night of the alleged date of the occurrence two persons stayed in room number 7. He personally opened the door of the room for their lodging and handed over the key to them. It would further go to show that in that night he slept on verandah near the room number 7. He got up at about 2.30 A.M. to urinate and then he heard the sound of screaming coming out of the room number 7. He immediately informed the proprietor of the hotel who was sitting on the counter. The evidence of this witness would further go to show that in the meantime the appellant came down and tried to escape. He had Jhola hanging from his shoulder. He was

prevented by the proprietor who brought him to up stair. The appellant himself opened the room and thereafter it was found that his colleague was lying dead in pool of blood. He would further state that the appellant Banarsi Singh confessed his guilt before him and told that he had killed his colleague due to enmity. This witness also supported the fact of arrival of police immediately thereafter who recovered a blood stained dagger at the instance of the appellant. The police also seized the blood stained cloths etc .from the Jhola of the appellant. He is also one of the witnesses of the seizure list prepared by the police.

14. P.W.6, Murtuza Hassan, A.S.I. would state that on 23/24.8.1980 he was on patrolling duty from 12.30 A.M. to 5.00 A.M. He reached near the hotel at about 3.10 A.M where the P.W.1 informed him about the incident. He immediately rushed to the room along with P.W.1 where he found the appellant being detained by P.W.3.The appellant disclosed his name as Banarsi Singh. His evidence would further go to show that the blood stained dagger was recovered from the ventilator at the instance of the accused-appellant. Some blood stained cloths were also recovered from the Jhola of the appellant. He prepared the seizure lists and recorded Fardbeyan of P.W.1. He also seized the identity card of the appellant as well as blood stained Tosak, pillow, bed-sheet etc. from the room. He also prepared inquest report of the dead body and sent the same to the hospital for post mortem. Material Exts. I to VIII are blood strined cloths, bed-sheet etc. Ext. 8 is the report of Forensic Science Laboratory which would go to show that all material Exhibits had

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stain of human blood.

15. P.W.7, Ram Sewak Singh is part investigating officer of the case whose main function was to record the statement of the father of the deceased. Paragraph 3 of the examination-in-chief of this witness would go to show that he also inspected the register of the hotel and encircled the entry in respect of room number 7.

16. P.W.2, Raghubans Prasad Singh, Sub-Inspector, is the person who submitted charge-sheet on the basis of investigation done by two previous investigating officers i.e. P.Ws. 6 and 7.

17. P.W. 4, Ram Awadh Singh is the father of the deceased and uncle of the appellant. His evidence would go to show that he was residing at Sasaram and running a laboratory. The deceased was reading in Class VII in Sasaram High School and his nephew, the accused-appellant, was also studying in the same school in Matric. On 23.8.1980 at 4 P.M. This witness gave Rs.130/- to the deceased in presence of the accused for purchase of some articles for dispensary. Banarsi Singh, later on, also went out of the dispensary. In the night. none of them returned. On 24.8.1980 at 11/12 P.M. the police informed him about the murder of his son. In paragraph 3 of the evidence this witness has stated that the accused was not serious about his study and there were several complaints against him. The deceased used to inform about his activities as a result of which the accused sometime used to assault the deceased.

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18. The defence of the appellant has been disclosed in cross-examination paragraph 39 of P.W.1. It would clearly go to show that

the appellant was present in the hotel in wee hours and he was arrested by the police at about 3.00 A.M.

19. On careful marshalling of evidence of prosecution witnesses coupled with defence , the following facts have emerged which would lead to definite conclusion of the guilt of the appellant;

(i) that the appellant and the deceased in the night of 23rd August, 1980 stayed together in room number 7 of New Anand Hotel .
(ii) that the victim was murdered in that very night and his dead body was found in room number 7.
(iii) That the appellant while attempted to escape in the early hour of morning was detained by the owner and waiter of the hotel.
(iv) That the blood stained weapon of the offence, the dagger, was seized by the police from the ventilator of the room at the instance of the appellant.
(v) That the blood stained cloths including shirt , pant etc. were seized from the Jhola of the appellant.

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20. The learned counsel for the appellant sought to impeach the entire prosecution story on the ground of non-mentioning the name of the deceased either in the inquest report or post mortem report. It was contended that the Fardbeyan (Ext. 2) which was said to be lodged at 3.30 A.M. contained the name of the deceased but the inquest report which was prepared at 6 A.M. did not mention the name of the deceased. Against the column of name of the deceased 'unknown male' has been mentioned and similarly in the post mortem report, also, which was prepared on 25.8.1980 the name of the deceased did not find mention. On these scores it was contended that Fardbeyan was anti-dated anti-timed and it was prepared after due deliberation in order to falsely implicate the appellant.

21. True, neither the inquest report nor the post mortem

report, which was prepared after Fardbeyan, mentions the name of the deceased whereas the Fardbeyan (Ext. 2), which was said to be lodged earlier to them, mentions the name of the deceased. However, in the facts and circumstances of the case it is of no significance. It appears from the evidence of P.W.6, Murtuza Hassan, coupled with seizure list (Ext. 1 series) that just after Fardbeyan the police started investigation and in course of it at about 4.45 A.M. articles were seized from the possession of the appellant. The Fardbeyan was immediately sent to the concerned police station and the police promptly at 8.30 A.M. registered the case. Ext. 5 is the formal F.I.R. Therefore, submission of the learned counsel for the appellant that the Fardbeyan was anti dated and anti timed does not appeal to the sense of this Court. Non-mentioning the name of the deceased either in the inquest report or in the post mortem report has valid explanation. The details of the dead body in the post mortem report are based on details mentioned in the inquest report. P.W.6, Murtuza Hassan, who is investigating officer of the case, recorded Fardbeyan and also prepared inquest report. The examination-in-chief of this witness would go to show that on interrogation the accused gave different name of the deceased at different times. The appellant for the first time gave the name of the deceased as Ramjee, then Birendra and lastly Jitendra. Thus, it is quite clear that the correct name of the deceased was not known till the preparation of inquest report and hence no specific name of the deceased was mentioned in the inquest report. Therefore, failure to mention the name of the deceased in Ext.

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6 or 4 does not lead to any adverse inference.

22. Second submission of learned counsel for the appellant is that entry in hotel register was not genuine. It was prepared, later on, in order to falsely implicate the appellant. It was urged that the evidence of first investigating officer, P.W. 6 would go to show vide paragraph 11, that no register was produced before him by the owner of the hotel but it was produced and exhibited in course of the trial by the informant and hence no reliance could be placed on such document.

23. Paragraph 11 of the evidence of P.W.6 would go to show that no register was produced before him. However evidence of second investigating officer, P.W.7, vide paragraph 3, would go to show that he in course of investigation examined the entry made in the register of the hotel. Ext. 9 is the relevant entry which would go to show that it was examined by P.W.7 on 25.8.1980. Therefore, the criticism of learned counsel for the appellant has no much substance.

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24. Apart from the above learned counsel for the appellant failed to offer any meaningful criticism against the evidence of witnesses. The chain of circumstances emerging from the evidence are so complete that it does not admit any other inference except the guilt of the appellant.

25. Thus, on proper and anxious consideration of the evidence, as discussed above, and materials placed on record and regard being had to the various contentions and criticisms raised on behalf of the appellant, this Court is of the opinion that findings of

guilt of the appellant recorded by the trial court do not call for any interference.

26. At the end of the argument, supplementary affidavit was filed on behalf of the appellant with averment that the appellant within the meaning of 2(k) of the Juvenile Justice (Care and Protection of Children) Act, 2000 was juvenile at the time of occurrence as he had not completed eighteen years of the age. In support of his age, a photo copy of certificate of Bihar School Examination Board was annexed as Annexure-A. According to Annexure-A the date of birth of the appellant is 17.1.1963 whereas the date of occurrence is 23/24 August, 1980. Thus, on the date of occurrence the age of the appellant was more that seventeen and half years but below eighteen years.

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27. It was urged by the learned counsel for the appellant that the claim of juvenility can be raised at any stage even before the Supreme Court. The appellant who ceased to be juvenile during the pendency of the trial is also entitled to benefit under the said Juvenile Justice Act and rules. In support of submission he placed reliance upon the decisions reported in **1984 SC 237 (Gopi Nath Ghosh vs. State of West Bengal), 1989 PLJR 507 (Krishna Bhagwan V. The State of Bihar) and (2005) 3 S.C.C. 551 (Pratap Singh V. State of Jharkhand and Others).**

28. It was further submitted that since the appellant was juvenile under Section 2(k) of the said Juvenile Justice Act, 2000 on the alleged date of the occurrence being less than eighteen years of

age, in event this appeal being dismissed, the record must be forwarded to the Juvenile Justice Board to pass order in accordance with provisions of the Act 2000.

29. There is no denial that the question of juvenility can be raised at any stage even before the Supreme Court in appeal. Section 7-A of the Act inserted through the Juvenile Justice (Care and Protection of Children) Amendment Act, 2006 has made it clear. According to it, it can be raised even after final disposal of the case, even if the juvenile has ceased to be so on or before the date of commencement of the Act. Other relevant provision is Section 20 of the Act which provides special provision in respect of pending cases. This provision has also been suitably amended through Amendment Act, 2006 and an explanation has been added which reads as follows;

> **"Explanation- In all pending cases including trial, revision, appeal or any other criminal proceedings in respect of a juvenile in conflict with law, in any Court, the determination of juvenility of such a juvenile shall be in terms of clause (1) of Section 2, even if the juvenile ceases to be so on or before the date of commencement of this Act and the provisions of this Act shall apply as if the said provisions had been in force, for all purposes and at all material times when the alleged offence was committed."**

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20. A Bench of this Court in a decision reported in 2007(2) PLJR 369 (Amit Kumar Thakur @ Amit Ranjan Thakur Vs. The State of Bihar) has considered the effect of amendment Act, 2006 as well as circumstances and conditions for extending the benefit of provision of Juvenile Justice Act, 2000 to a person/accused who though juvenile on the date of alleged occurrence but ceases to be so on or before the date of commencement of the Juvenile Justice (Care and Protection of

Children) Act, 2000; in the light of two decisions of Apex Court reported in **(2005) 3 SCC 592 (Upendra Kumar Vs. State of Bihar) and 2005(1) PLJR (SC) 393 (Pratap Singh Vs.State of Jharkhand and Another).** Paragraph 13, 14, 15, 16 and 17 of the above decision of this Court are relevant which are as follows;

13-" It will be relevant to mention here that the question for consideration in this connection will be whether even considering the provisions of the amended Act, the petitioner will be covered under 2000 Act so as to bring him within the ambit of the aforesaid Act.

14- In the case of Pratap Singh (Supra) in its Para 37(b) the following condition has been laid down;

> (b) The 2000 Act would be applicable in a pending proceeding in any court/ authority initiated under the 1986 Act and is pending when the 2000 Act came into force and the person had not completed 18 years of age as on 1.4.2001.

15. Hence, in order to ensure application of Act 2000, a proceeding against the petitioner must be pending under 1986 Act (Emphasis supplied).

16- In the case of Bijendra Singh Vs. State of Haryana and Anr. Reported in 2005 A.I.R. SCW page 2049,it was held as follows;

> P.12; Thus, by reason of legal fiction, a person, although not a juvenile, has to be treated to be one by the Board for the purpose of sentencing which takes care of a situation that the person although not a juvenile in terms of the 1986 Act but still would be treated as such under the 2000 Act for the said limited purpose.
>
> P.13: Section 20 of the 2000 Act would, therefore, be applicable when a person is below the age of 17 years as on 1.4.2001. For the purpose of attracting section 20 of the said Act, it must be established that: (i) on the date of coming into force the proceedings in which the petitioner was accused was pending, and (ii) on that day he was below the age of 18 years. For the purpose of the said Act, both the aforementioned conditions are required to be fulfilled. By reason of the provisions of the 2000 Act, the protection granted to a juvenile has been extended but such extension

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is not absolute but only a limited one. It would apply strictly when the conditions precedent therefore as contained in section 20 or section 64 are fulfilled.

P.14: The embargo of giving a retrospective effect to a statute arises only when it takes away vested right of a person. By reasons of section 20 of 2000 Act no vested right in a person has been taken away, but thereby only an additional protection had been provided to a juvenile.

P.15: Provisions of 2000 Act would be applicable to those cases initiated and pending trial/enquiry for the offences committed under 1986 Act provided that the person had not completed 18 years of age as on 1.4.2001. In the instant case undisputedly the respondent no.2 accused had completed 18 years of age before 1.4.2001.

17. Even if the new provisions contained in amended Act, 2006 both in respect of " Extent (commencement and application" as well as "Explanation" of Section 20 which deals definition of juvenility are taken into consideration, in view of the fact that on the basis of the commencement of the Act, no proceeding was pending against the petitioner under 1986 Act, in a court of law or before any authority as on 1.4.2001, the new amended enactment cannot be pressed into service to bring the petitioner within the ambit of benefit of Juvenile Justice (Care and Protection of Children) Act, 2000 for the purpose of bail and the consequent benefit u/s 436 (A) of the Criminal Procedure Code shall not also be accrued to the petitioner, more so is reiterated that in view of the aforementioned decision in the case **of "Pratap Singh Vs. State of Jharkhand"** (supra) being a decision of the Constitution Bench of the Hon'ble Supreme Court and the decision of the Hon'ble Supreme Court in the case of "**Bijendra Singh Vs. State of Haryana**"(supra) since no proceeding on the 1986 Act was pending under 1986 Act during commencement of 2001 Act on 1.4.2001, the petitioner shall not be rendered the benefit of Amended Act, 2006."

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21. Thus, in view of the aforesaid observations of this Court based on Apex Court decisions following two conditions must be fulfilled before extending benefit of provisions of 2000 Act including the provisions of Amended Act, 2006 to any accused;

(i) the proceeding in question must be initiated under the Juvenile Justice Act, 1986 and
(ii) on the date of commencement of the Act 2000 i.e. 1.4.2001 the person had not completed the age of

eighteen years.

22. In this case none of the two conditions is present. The date of occurrence is 23/24 August, 1980. On that date the Juvenile Justice Act, 1986 was not in existence. In other words, the case in question was not initiated under the 1986 Act. According to the certificate (Annexure-A), on the date of the occurrence the appellant was more than seventeen and half years in age. The Act 2000 came in to force on 1.4.2001. On that date the age of the appellant was much more than eighteen years. Therefore, in view of the above decision apparently the appellant was not entitled to get the benefit of provisions of 2000 Act or its Amended Act, 2006.This Court does not find any merit in the aforesaid contentions of the learned counsel for the appellant.

23. In the result, this appeal is dismissed and the judgment and order of conviction and sentence passed by the trial court against the appellant is hereby confirmed. As the appellant is on bail, his bail bond is cancelled. The appellant is directed to surrender before the lower trial court to serve out the remaining period of sentence.

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(Ghanshyam Prasad, J.)

Shyam Kishore Sharma,J. I agree.

(Shyam Kishore Sharma,J)

PATNA HITH COURT
DATED 24TH OCTOBER, 2008
NAFR/B.JHA

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